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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 UNITED STATES OF AMERICA,

10 Plaintiff,

No. CR08-197Z

11 v.

ORDER

12 BRIAN BONNAR,

13 Defendant.

14 This matter comes before the Court on Defendant's Motion to Dismiss Count Two,  
15 docket no. 25. The Court, being fully advised, now enters the following Order.

16 **BACKGROUND**

17 Defendant Bonnar has been charged with a two-count indictment arising from an  
18 alleged assault of Irene Damon on or about October 22, 2005. Count One charges a violation  
19 of the victim's federal rights in violation of 18 U.S.C. § 242. Count One alleges, in part, that  
20 the defendant "did assault Irene Damon, resulting in bodily injury to her" thereby depriving  
21 her of her civil rights. Count Two charges that on or about January 17, 2008, the defendant  
22 made false material declarations before the grand jury. Specifically, Count Two alleges, in  
23 part, as follows:

24 In January 2008, a federal grand jury in Seattle, Washington, was conducting an  
25 ongoing investigation into possible violations of federal law relating to defendant  
26 Brian Bonnar's assault of Irene Damon on or about October 22, 2005. Specifically,  
the grand jury was investigating allegations that defendant Brian Bonnar, while acting  
under color of law, had assaulted Irene Damon by intentionally striking her in the

1 head with his knee after she was handcuffed, lifting her up from the ground by her  
2 hair, and slamming her head against a police car. Accordingly, it was material to the  
3 grand jury's investigation to determine all truthful information relating to the offense,  
necessarily including all information regarding defendant Brian Bonnar's action and  
his state of mind in committing them.

4 On or about January, 17, 2008, in the Western District of Washington, defendant  
5 BRIAN BONNAR after having duly taken an oath to testify truthfully, and while  
6 testifying in a proceeding before the Grand Jury of the United States District Court for  
the Western District of Washington, did knowingly make false material declarations  
before that grand jury.

7 Specifically, the defendant gave the following false testimony in the grand jury,  
8 knowing such testimony to be false [false declarations are underlined]:

9 Q: Just so the Grand Jury is clear, did you intentionally strike Irene Damon in the  
10 head with your knee?

11 A: No, sir.

12 Q: Did you intentionally strike Irene Damon in the head with anything?

13 A: No, sir.

14 Q: Did you intentionally strike Irene Damon after you realized she was  
15 handcuffed?

16 A: No, sir.

17 Q: Did you intentionally slam Irene Damon's head against the car?

18 A: No, sir.

19 Q: Did you intentionally lift Irene Damon up by her hair?

20 A: No, sir.

#### 21 The Truth

22 The above declarations were false in that defendant Brian Bonnar intentionally struck  
23 Irene Damon in her head with his knee after he knew that she was handcuffed,  
24 intentionally lifted Irene Damon off of the ground by her hair, and intentionally  
25 slammed Irene Damon's head against a police car.

26 All in violation of Title 18, United States Code, Section 1623.

Defendant now moves under Federal Rule of Criminal Procedure 12(b) to dismiss  
Count Two as duplicitous because it alleges more than one offense in a single count and  
undermines the defendant's right to fair notice and a unanimous jury verdict.

1 ANALYSIS

2 Rule 8(a) of the Federal Rules of Criminal Procedure requires that an indictment must  
3 contain “a separate count for each offense.” United States v. Aguilar, 756 F.2d 1418, 1420  
4 n.2 (9th Cir. 1985). An indictment is duplicitous when a single count joins two or more  
5 distinct and separate offenses. United States v. Ramirez-Martinez, 273 F.3d 903, 913 (9th  
6 Cir. 2001), overruled on other grounds, United States v. Lopez, 484 F.3d 1186 (9th Cir.  
7 2007) (en banc). A count is duplicitous if a jury may find the defendant guilty on a count  
8 without having reached a unanimous verdict in the particular offense. The principal test for  
9 determining whether a single count improperly contains multiple, distinct offenses is  
10 “whether identical evidence will support each of them, and if any dissimilar facts must be  
11 proved there is more than one offense.” United States v. Holley, 942 F.2d 916, 928 (5th Cir.  
12 1991) (quoting Bins v. United States, 331 F.2d 390, 393 (5th Cir. 1964)).

13 Each of the separate alleged false statements in Count Two will require different  
14 evidence at trial. The evidence to prove whether defendant made one or more of the charged  
15 false statements is different. For example, the evidence to support the first alleged false  
16 statement denying that he did “intentionally strike Irene Damon in the head with your knee”  
17 is quite distinct from the evidence necessary to support the third alleged false statement  
18 denying that he did “intentionally strike Irene Damon after you realized she was handcuffed”  
19 or the fourth alleged false statement denying that he did “intentionally slam Irene Damon’s  
20 head against the car.”

21 The Government’s contention that Count Two merely alleges that the defendant  
22 committed a “single offense by multiple means” Response at 2, is without merit. The  
23 statements at issue here amount to alleged false statements concerning distinct subjects. The  
24 Government’s reliance on cases like United States v. Arena, 226 F.2d 227 (9th Cir. 1955)  
25 cert. denied, 350 U.S. 954 (1956), and United States v. Vitello, 425 F.2d 416 (9th Cir. 1970)  
26 is misplaced. In Arena, (a case only involving two counts one of which was a perjury

1 charge), several questions were asked during the grand jury investigation. The court noted  
2 that “they were all ancillary to the \$64 question” namely whether he had received the money  
3 from another person. 226 F.2d at 236. The Arena court reasoned that “[t]he minor questions  
4 were all directed toward refreshing the appellant’s recollection, so that there could be no  
5 mistake as to the deliberateness of his lie . . . .” Id. In contrast, Bonner was asked at least 5  
6 separate questions which were each directed to a separate way in which the Government  
7 contends the assault occurred. In Vitello, defendant was convicted of perjury under an  
8 indictment charging that defendant falsely swore he never placed a bet with a certain  
9 bookmaker. Vitello involved 3 separate questions (falsely swearing he never placed a bet  
10 with any bookmaker in the United States other than Mr. Harrison; falsely swearing that he  
11 did not know a Charles Spencer; and third, falsely swearing he never placed a bet with Ruth  
12 Hughes). Defendant’s objection related to the unanimity instruction which was approved by  
13 the Appellate Court.

14 In contrast to raising the issue at trial or on appeal, defendant in this case raises the  
15 issue in a pretrial motion under Rule 12(b). He is entitled to have his duplicity claim cured  
16 in a timely manner before trial. The Government’s suggestion that the issue can be cured at  
17 trial with a proper jury instruction is rejected. See United States v. Bonds, 2008 U.S. Dist.  
18 Lexis 28934 (N.D. Cal., March 4, 2008).

19 Prior to trial, the Court may either dismiss a duplicitous count or order the  
20 Government to elect the alleged false statement in the count on which to proceed. United  
21 States v. Aguilar, 756 F.2d 1418, 1422-23 (9th Cir. 1985). Providing the Government with  
22 an election is an appropriate remedy. In this case, the Court concludes Count Two must be  
23 dismissed unless the Government elects to proceed on one false statement in Count Two or  
24 otherwise chooses to supersede the indictment.<sup>1</sup>

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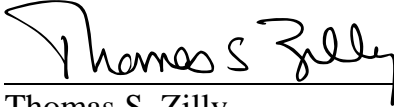
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26 <sup>1</sup>The Court does not address in this Order the question of whether the questions asked are  
repetitious. See Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970).

1 CONCLUSION

2 For the reasons stated, the defendant's motion is GRANTED IN PART. The  
3 Government must elect, within 20 days of this Order, which alleged false statement  
4 contained in Count Two will remain for trial. If the Government fails to elect within 20  
5 days, Count Two will be dismissed.

6 IT IS SO ORDERED.

7 DATED this 1st day of October, 2008.

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9 Thomas S. Zilly  
10 United States District Judge  
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